

CA20N
MA 700
-1995
W17

Government
Publications

The Waterfront Trail: Liability and Risk Management Issues



Waterfront
Trail

The Waterfront Trail: Liability and Risk Management Issues

Prepared for the
Waterfront Regeneration Trust

November 1995



McCarthy Tétrault

BARRISTERS & SOLICITORS • PATENT & TRADE MARK AGENTS

SUITE 4700, TORONTO DOMINION BANK TOWER
TORONTO-DOMINION CENTRE, TORONTO, CANADA M5K 1E6

Canadian Cataloguing in Publication Data

Main entry under title:

The Waterfront Trail : liability and risk management issues

ISBN 0-7778-4609-8

1. Trails—Ontario, Lake, Region (N.Y. and Ont.) 2. Liability (Law)—Ontario, Lake, Region (N.Y. and Ont.) 3. Risk management—Ontario, Lake, Region (N.Y. and Ont.) I. McCarthy, Tétrault (Firm) II. Ontario. Waterfront Regeneration Trust.

GV182.W37 1995

796.5'09713'5

C95-964087-8



Commissioner
The Honourable David Crombie, P.C.

Commissaire
L'honorable David Crombie, p.c.

Deputy Commissioner
David A. Carter

Sous-commissaire
David A. Carter

22 November 1995

Dear Colleague,

I am pleased to provide a copy of *The Waterfront Trail: Liability and Risk Management Issues*.

The Waterfront Regeneration Trust asked McCarthy Tétrault to report on the liability and risk management issues affecting trail users, landowners, trail managers and municipalities. This report was finalized following a process of consultation with interest groups and municipalities.

The report focuses on the legal framework and the responsibilities of the municipalities managing their respective portions of the Waterfront Trail. The trail manager's responsibility to care for the safety of trail users is found to be similar to the responsibilities of municipal property managers in caring for existing public roads and park lands.

This document represents the opinion of the authors and not necessarily that of the Trust.

I hope that you will find this report useful and timely. I will appreciate your feedback, comments or questions; please direct them to Suzanne Barrett, Director of Environmental Studies at the Waterfront Regeneration Trust.


Thanks, as always, for your continued interest and involvement in this work.

Sincerely,

David Crombie

Table of Contents

INTRODUCTION	1
THE DUTY TO MAINTAIN ROADS, HIGHWAYS AND PUBLIC LANDS	3
Municipal Roads and Provincial Highways	3
Public Lands and <i>Occupiers' Liability Act</i>	7
Warnings and Signage	10
LIABILITY IN NEGLIGENCE	13
Liability of the Waterfront Regeneration Trust ..	14
Defences to Negligence Claims	15
Liability for the Actions of Third Parties	18
Liability for Nuisance	19
RISK MANAGEMENT – REDUCING AND CONTROLLING LIABILITY	22
CONCLUSIONS	29
ENDNOTES	31
BIBLIOGRAPHY	33



Digitized by the Internet Archive
in 2022 with funding from
University of Toronto

<https://archive.org/details/31761115480410>

Introduction

The Waterfront Regeneration Trust is facilitating the establishment of a Lake Ontario Waterfront Trail for public recreational use and enjoyment. Between Burlington and Trenton the Waterfront Trail passes through twenty-two cities, towns and townships. The trail is located primarily on existing public lands and road right of ways. Some trail sections cross private lands.

In most cases the local municipality has ownership and direct maintenance responsibility for the roads, parks and other public lands on which the trail is located. In addition to the ethical and professional responsibility of municipal trail managers to make the trail safe for visitors, there is a corresponding legal duty. This report is intended to address that legal duty, to consider the liability for negligent breach of the duty, and to outline a framework for risk management measures that will assist trail managers to minimize their liability exposure.

Section 1 of this report, "The Duty to Maintain Roads, Highways and Public Lands", provides a description of the legal duty imposed on trail managers to take reasonable care to provide safe public roads and trails. That duty is set out in the *Municipal Act* with respect to public roads and in the *Occupiers' Liability Act* with respect to all other private and public lands. Municipal property managers will be familiar with these legal duties which already apply to all of the existing lands, parks and roads under municipal ownership and control.

Section 2, "Liability in Negligence", considers the legal liability that may be imposed on trail managers where a failure to satisfy the statutory duty of care results in personal injury or property damage. The essential elements of a negligence claim and some of the more common defences against such claims are described.

The best defence against negligence liability claims will be a sound program of risk management intended to minimize injury or damage. A risk management program will also assist in defending against claims that do arise by demonstrating that the trail manager has fulfilled the duty to take reasonable care for the safety of trail users. Section 3, "Risk Management – Reducing and Controlling Liability", outlines a framework for a program of risk management or mitigation. Such a program will already be in place in many municipalities and might simply be expanded or adapted to the Waterfront Trail. Finally, the report identifies insurance as an essential risk management tool, required to address those claims that will arise, despite the efforts to plan, develop and maintain a safe recreational trail.

This report is intended only to provide general information and an overview on trail safety, liability and risk management issues. It is not provided as advice on particular fact situations. For advice on specific issues, concerns or management practices, readers and municipal trail managers should consult with their solicitors, insurers or risk management specialists, as appropriate.

The Duty to Maintain Roads, Highways and Public Lands

MUNICIPAL ROADS AND PROVINCIAL HIGHWAYS

As significant portions of the Waterfront Trail are located on or adjacent to municipal roads and highways, it is essential to consider the legal duty to provide for public safety within the road right of ways. Municipalities are required to maintain municipal roads under section 284 of the *Municipal Act*, which provides that:

“284.(1) Every highway and every bridge shall be kept in repair by the corporation the council of which has jurisdiction over it or upon which the duty of repairing it is imposed by this Act and, in case of default, the corporation, subject to the *Negligence Act*, is liable for all damages sustained by any person by reason of such default.”

The term “highway” is used broadly in that section to include municipal roads. As “highway” is also interpreted to include the sidewalks and the shoulders of the travelled road, a recreational trail or bicycle route located within the road right-of-way would almost certainly be part of the travelled portion of the highway subject to the statutory duty set out in section 284 of the *Municipal Act*.

This statutory duty has been interpreted by the courts as requiring that a particular road should be “kept in such a reasonable state of repair that those requiring to use the road may, using ordinary care, pass to and fro upon it in safety.”¹

The statutory duty now set out in section 284 has existed in Ontario since before the turn of the century, when it was determined that the meaning of “repair” and the standard of care may vary from one locality to another, depending upon the amount of traffic, the economic means of the municipality to repair the roads and the requirements of the public.²

Provincial Highways

Provincial highways are subject to a duty of repair under section 33 of the Ontario *Public Transportation and Highway Improvement Act* similar to that set out in the *Municipal Act*. In the case of the Waterfront Trail, the Provincial Ministry of Transportation has been fully involved in trail planning and implementation, and is co-operating in the location of the trail on Provincial Highway right of ways where required. Where the trail is located on the shoulder of the Provincial Highway, it will be constructed and maintained by the Provincial Ministry of Transportation.

Eventually, it may be possible or desirable to have the trail located away from the shoulder but within the highway right of way. In that case, the construction and maintenance responsibility might be taken on by the local municipality. This situation is contemplated in the statute which provides that the duty to maintain and repair sidewalks or other municipal undertakings located on the highway, remain the responsibility of the municipality, “in the same manner and to the same extent as in the case of any other like work constructed by the municipality”.³

Sidewalks

For purposes of both the *Municipal Act* and the *Highway Traffic Act* a “highway” (as defined in section 1 and referred to in section 284 of the *Municipal Act*) includes a sidewalk. Accordingly, sidewalks would be subject to the duty described above for highways gener-

ally. Bicycle paths and foot paths established by by-law within the highway under subsection 310 (5) of the *Municipal Act* would also be subject to that duty.

Subsection 284 (4) of the *Municipal Act* sets out special provisions for sidewalks, providing that a municipality will not be held liable for personal injury caused by snow or ice upon a sidewalk unless the municipality had been guilty of gross negligence. Although this appears to be a significantly reduced standard of care, courts have interpreted this provision narrowly and often require a reasonable standard similar to the general duty of care for roads.

The Standard of Care for Pedestrians and Cyclists

A higher standard of repair and maintenance is generally required where pedestrians cross the road or the intersection.⁴ For example a rough road surface, or the failure to remove snow and ice might be acceptable where only motorized vehicle traffic is anticipated. However, that would not be acceptable and a higher standard of maintenance would be required if pedestrians were expected to cross the street at an intersection, in front of vehicles. Similarly, a higher standard of care should be anticipated wherever pedestrians or cyclists are invited and encouraged to share the travelled road surface with vehicles.

Cyclists have their own requirements which are reflected in the design and maintenance standards. For example, on rural roads with low traffic volumes it might not be necessary to provide a separate lane for cyclists. However, where cyclists and vehicles are encouraged to share a road surface, common sense, available standards, and the case law would all require special care and a higher standard of design to provide for the safety of trail users.

In cases where a reduced standard was justified by low traffic levels, it will be necessary to monitor the level of use to confirm over time that the reduced standard is still justifiable.

Trail Design and Maintenance Guidelines

“Repair” of highways has been broadly interpreted to include design, construction and maintenance. Failure to design and construct the road to commonly accepted standards may constitute non-repair resulting in municipal liability. In *Houser v. The Township of West Lincoln* the court looked first at engineering standards to determine whether a dangerous curve had been properly designed or built. The court went on to find that the municipality could have warned of the danger with signage but had failed to do so.⁵

The Ontario Ministry of Transportation has recently developed design guidelines regarding the shared use of roads and bicycles and published a draft Interim Bikeway Guideline. Based partly upon that work, the Waterfront Regeneration Trust has also prepared *Waterfront Trail Design Guidelines* in which the requirements for surface width and vehicular separation increase as the amount of traffic increases. Those Guidelines should be considered by trail managers, and might be considered by courts, in determining whether the design and construction of the trail had achieved a satisfactory standard of care.

In the case of the Waterfront Trail, now that design, sign and maintenance guidelines have been published, there will be an obligation on trail managers to design, build and maintain according to those accepted guidelines.

Inspections

Reasonable care also requires that municipalities inspect the road so that they can be aware of and prevent or repair dangerous conditions. That requirement for inspection would apply to recreational trails located within the road right of way. In a case considering the obligation of the British Columbia Department of Highways to undertake inspections and remedial works on rock

slopes, the Supreme Court of Canada described the obligation to inspect in the following terms:

“In each case the frequency of and method [of inspection] must be reasonable in light of all the surrounding circumstances. The governmental agency should be entitled to demonstrate that balanced against the nature and quantity of the risk involved, its system of inspection was reasonable in light of all the circumstances including budgetary limits, the personnel and equipment available to it and that it had met the standard duty of care imposed upon it.”⁶

Finally, repairs to remedy any dangerous condition discovered by inspection should be undertaken expeditiously.

PUBLIC LANDS AND OCCUPIERS' LIABILITY ACT

For lands other than municipal roads and provincial highways the legal duty for the safety of visitors is set out in the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2. This statute was first enacted in 1980 and applies to both private and public lands.

Subsection 3 (1) of the *Occupiers' Liability Act* provides as follows:

“3.(1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.”

The “Occupier”

An occupier is defined in the statute as a person in physical possession of the premises, or a person who has responsibility for and control over the premises.

In most cases the municipality will be considered the occupier of municipal parks and properties. Similarly, a conservation authority or private land owner would be considered the occupier of any lands under their ownership or control.

Where the municipal trail crosses private lands both the private owner and the municipality could be considered occupiers. In that case the owner may seek an agreement from the municipality assuming responsibility for trail maintenance and indemnifying or protecting the landowner from any liability claims related to the trail.

Interpretation of the Duty

In a decision that was later affirmed by the Supreme Court of Canada, the Ontario Court of Appeal interpreted the duty in Section 3 as follows:

“All Courts have agreed that the section imposes on occupiers an affirmative duty to make the premises reasonably safe for persons entering them by taking reasonable care to protect such persons from foreseeable harm. The section assimilates occupiers’ liability with the modern law of negligence. The duty is not absolute and occupiers are not insurers liable for any damages suffered by persons entering their premises. Their responsibility is only to take “such care as in all the circumstances of the case is reasonable”. The trier of fact in every case must determine what standard of care is reasonable and whether it has been met.”⁷

This “affirmative duty to make the (trail) premises reasonably safe” is the starting point for the guidance of managers in trail design, construction, maintenance, risk management and safety programs.

A Lesser Duty Owed to Recreational Trail Users?

In certain circumstances section 4 of the Act provides relief from that affirmative duty. Subsection 4 (1) of the Act states:

“4.(1) The duty of care provided for in subsection 3 (1) does not apply in respect of risks willingly assumed by the person who enters on the premises, but in that case the occupier owes a duty to the person not to create a danger with deliberate intent of doing harm or damage to the person or his property and not to act with reckless disregard of the presence of the person or his property.”

Subsections 4 (3) and (4) go on to provide that persons entering on “recreational trails” for recreational purposes and without paying a fee, are deemed to have willingly assumed all risks and are subject only to the reduced duty set out in subsection 4 (1). As subsection 4 (1) requires only that the occupier not deliberately create a danger or act with reckless disregard, this would appear to offer significant relief to occupiers and trail managers from the positive duty of care. However, courts are very reluctant to find an injured plaintiff entirely responsible for his own injuries, especially where responsibility for the damage or injury can be apportioned or divided between the injured plaintiff and the occupier.

The Prudent Trail Manager

Rather than rely on section 4 of the *Occupiers' Liability Act*, the more prudent course for trail managers will be to make all reasonable efforts to comply with the positive duty set out earlier in section 3 of the Act to make the trail safe. This would be consistent with the larger objective to build and maintain a safe and enjoyable trail for public use.

Of course, when liability claims do arise trail managers may still attempt to take advantage of both the legislative protection in section 4 and the related defences which may be available to them.

Those defences, including the voluntary assumption of risk by the plaintiff, are described section 2 of this report, “Liability in Negligence”.

For convenience in this report the municipality or agency responsible for trail development and management is referred to generally as the trail manager. This is not a reference to the individual staff members, as a municipality or agency will be responsible for the acts of employees acting within the scope of their employment.

WARNINGS AND SIGNAGE

Occupiers’ Liability Act

The duty to make the trail reasonably safe may include an obligation to place signs or warnings where trail users could not be expected to see or anticipate a particular hazard. For example, a hidden intersection with vehicular traffic or a change in trail surface might justify the installation of warning signs.

However, the placement of warning signs is not effective to relieve occupiers of the duty to make the premises reasonably safe and should not be relied upon to absolve trail managers of responsibility where dangerous conditions could lead to injury or damage.

There is a practical problem in relying on warning signs. That is simply that people do not always see, or admit to seeing the signs. In the context of a court case it may also be difficult for a defendant to prove that the signs were visible or that the plaintiff chose to ignore them. For example, in *Hewitt v. The City of Etobicoke*⁸ a sign warning of the danger of a toboggan hill was not noticed by tobogganers and the court found the municipality liable for failing in its duty to make the hill reasonably safe.

Even where a victim is notified or well aware of a hazard, the courts may consider the warning inadequate, and place liability on the occupier. In *Waldick v. Malcolm*, for instance, farmyard owners were held liable for failing in their duty to make their driveway reasonably safe, even though the injured plaintiff had known, previous to the accident, about the dangerous ice-covered conditions on the driveway.

Occupiers' liability cases seem to suggest that in addition to warning of hazards, occupiers must take steps to inspect for, and correct, these hazards. In *Preston v. Canadian Legion* the court stated that "it is necessary for the occupier to inspect and to protect visitors if the conditions become dangerous by blocking access to dangerous areas in the lot, by sanding or salting, or by any other reasonable and inexpensive means. To do nothing at all regardless of changing conditions is surely not reasonable care to see that visitors are reasonably safe".⁹

Municipal Act: Public Roads and Highways

Under section 284 of the *Municipal Act*, municipalities have a duty to keep public roads and highways in good repair. The Act also permits municipalities, subject to the *Highway Traffic Act*, to regulate and prohibit traffic on public highways. Courts have held a municipality at least partly liable in negligence when failure to warn of a hazard on a public highway has contributed to an accident or injury.¹⁰

The court rulings on cases regarding signs and hazards, including the cases described above suggest that trail managers should:

- take appropriate steps to erect warning signs indicating hazards to pedestrians and cyclists using a recreational trail;

In *Dubois v. Sault Ste. Marie*¹¹, the Court of Appeal found a municipality liable for failing to warn of a hazardous ditch under construction. In that case the court said that while the construction of the ditch created the hazard, "the effective cause of the accident was the failure of the municipality to adequately warn of such hazard". The duty to warn of danger includes insuring that warnings are adequate and remain in place until a hazard has been corrected. These warnings must be visible to users. In *Greatrex v. Ennismore*¹² the Ontario High Court of Justice found a municipality negligent in allowing foliage to remain untrimmed and therefore to obstruct a stop sign on a road. The court said that "precautions should be taken so that the standard of visibility is maintained in such conditions". The Supreme Court of Canada has confirmed that the maintenance of appropriate signage is part of the statutory duty to maintain the highway in repair.¹³

- insure that the warnings are maintained until a hazard is eliminated if same is possible;
- simultaneously, take reasonable steps to actually repair the hazard, if same is possible; and
- where the hazard is not repairable, the warning signs should be maintained in location.

What is reasonable will relate to the particular circumstances. In a case in the City of Winnipeg for instance, the court agreed that repairs to a sidewalk could be delayed until the ground was thawed. In the meantime, the court required that the City ensure that warning barricades be maintained.

Liability in Negligence

Where a trail manager neglects or fails to maintain a safe trail and where a visitor is injured because of that neglect or failure, then the injured visitor may be entitled to recover damages or compensation in a law suit. At least three elements are critical in a successful claim for damages based on negligence.

i. a legal duty to take care

The first is the existence of a duty owed by the defendant to the plaintiff. As described in preceding sections, the *Municipal Act* and the *Occupiers' Liability Act* set out respectively, a duty on the municipality to keep roads in repair suitable for safe public use, and on occupiers of property to take reasonable care for the safety of visitors on the property.

In addition to those duties established by statute, a court may find that a duty exists to take care for the safety of others, wherever it is reasonably foreseeable that your actions could lead to harm. So for example, a body or agency promoting and organizing cycling on the Waterfront Trail could have a duty not to lead participants into unreasonably dangerous situations.

ii. breach of the duty

If the duty exists the courts will look secondly at whether there has been a breach of that duty. Commonly accepted standards for design and maintenance may be referred to in determining whether there has been a breach of the duty or standard of care. So for example, where defects in the trail surface created a danger for cyclists, or where intersections with motor vehicle traffic were not signed according to signage guidelines, then it might be found that the trail manager was in breach of the applicable standard of care.

iii. breach causing damage

Third, it is necessary to question whether the breach of duty or standard of care was the cause of the damage or injury. Where for example the failure to install or maintain signs warning of a hidden vehicular intersection led directly to an accident and injury, this test would be satisfied and the plaintiff might be entitled to compensation. Consider, on the other hand a case in which the trail user was proceeding cautiously because they knew of the intersection and the accident was caused by a careless truck driver. In that case, where the failure to post a sign was not the cause of the accident, the trail manager might be partially or entirely relieved of liability.

Proof of damage or injury may be considered independently, as an additional element necessary to completely establish the case in negligence.

Conduct of Plaintiff

Finally, the conduct of the plaintiff should also be considered. For example, a court would ask whether the plaintiff voluntarily assumed the risk of engaging in a potentially dangerous activity, or whether the reckless behaviour of the plaintiff was the real cause of the injury. In Ontario, the *Negligence Act* provides that the damages to be paid by the defendant may be divided or reduced to the extent that the plaintiff may have partially been to blame for his own injury. Contributory negligence and the voluntary assumption of risk are considered in the following section of this report, under the heading of defences to negligence claims.

LIABILITY OF THE WATERFRONT REGENERATION TRUST

As outlined above, the duty to repair and to maintain public lands and roads is assigned by statute directly to the occupier having

possession and control over the property. In most cases that will be the municipality. The Waterfront Regeneration Trust will not normally be an owner, occupier or manager of lands and therefore will not share automatically in that responsibility by operation of law.

There is however, at least one area of potential liability facing the Trust. To the extent that the Trust engages in promoting and advertising the trail, in providing information, brochures or maps, or in organizing trail participation events it will have a responsibility to conduct those activities in a safe manner which does not misinform trail users or expose them to hazardous situations. As soon as a decision is made to engage in any of the above promotion activities there will also arise an obligation to conduct those activities with reasonable regard for the safety of the intended participants.

This duty would arise under the negligence principles as outlined above where it is foreseeable that the Trust activities could result in harm to trail users. In the event of injuries actually caused by organized or promotional events, it is likely that plaintiffs would claim against both the Trust and the municipal trail manager.

DEFENCES TO NEGLIGENCE CLAIMS

Voluntary Assumption of Risk

Almost any recreational activity will include some element of risk. Recreational cross-country skiers, for example, may be aware of the risks inherent in their sport and yet decide voluntarily to accept those risks and the responsibility for their own safety. If an injury occurs, and the injury is not caused by any deficiency in the ski trail conditions or any negligence by the landowner or occupier, then the landowner should be entitled to defend against liability by arguing that the skier was aware of those risks and voluntarily accepted responsibility for their own safety.

The Ontario Court of Appeal and the Supreme Court of Canada recently affirmed that narrow view in the case of *Waldick v. Malcolm*.¹⁴ That was a case in which there had been an ice storm and the plaintiff knew that the ground and driveway were coated in ice. Nevertheless, the plaintiff walked across the driveway toward his car. He fell and was injured. The Court found the occupier negligent for failing to sand or salt the driveway. The Court also decided that the plaintiff had not voluntarily assumed the risk of injury merely by crossing the driveway while knowing that it was dangerous. In addition to knowledge of the danger, the Court found that the plaintiff must also give up his legal right to recover for damages or injury by an express or implied bargain with the occupier. This has been described as assuming both the physical and the legal risk in the activity. Clearly, this would be a difficult test to meet, as few landowners, occupiers or visitors will stop to explicitly address legal liability prior to entry on the land.

Traditionally however, courts have taken a very narrow view of the voluntary assumption of risk and the relief from liability that it might afford to landowners (see sidebar).

In these circumstances landowners are understandably reluctant to allow recreational access on their property. One of the principal objectives of the *Occupiers' Liability Act* was to encourage public and private landowners to permit public recreational access to their land. In order to do so, section 4 of the Act was intended to provide relief to the landowners or occupiers from the general duty to care for the safety of recreational visitors. Section 4 provides that persons entering specified premises, including "recreational trails reasonable marked by notice as such", are deemed to have willingly assumed all risks for their own safety.¹⁵ The duty of the landowner is described simply as the duty not to deliberately create a danger and not to act with reckless disregard.

This section of the *Occupiers' Liability Act* is a direct attempt by the legislature to counteract the traditional reluctance of the courts to find visitors responsible for their own safety. It attempts to relieve landowners of liability except in extreme cases and to make the landowners more willing to allow access by recreational users or visitors.

The voluntary assumption of risk may only be available in the narrow circumstances defined in section 4, including "non-paying recreational users on recreational trails reasonably marked as such". If injuries occurred just off the recreational trail or if an accident involved persons not on the trail for recreational purposes, the occupier might not qualify for the protection of section 4 and the voluntary assumption of risk.

Further, the *Negligence Act* provides for the apportionment of the liability and damage between the plaintiff and defendant. Given the opportunity to assign partial liability courts may be

reluctant to blame the victim or to find that the plaintiff/victim has voluntarily assumed all of the risk.

For all of those reasons trail managers should not rely on the voluntary assumption of risk as an excuse for reduced management and safety standards. The care and management of the trail should in all sections be maintained at the reasonable standard of care required to identify and remedy hazards, and to make the trail reasonably safe. In addition however, trail managers should maintain the option of defending themselves under section 4 of the *Occupiers' Liability Act* in the event of claims. For example the trail could be clearly identified as a recreational trail in promotional materials and maps. Notice to users that this is a recreational trail may assist trail managers and their counsel in arguing that plaintiffs had voluntarily assumed the risk themselves and in arguing that only the section 4 reduced standard of care should apply.

Voluntary assumption of risk is not normally applicable in cases dealing with public roads, as the province or municipality will have the statutory duty to keep the road in reasonable repair. That statutory duty cannot be avoided by arguing that persons using the road do so entirely at their own risk. However, if people use the road recklessly and without regard to the safety of themselves or others, then a municipality may argue that contributory negligence by the plaintiff was at least partly to blame for the injury or damage.

Contributory Negligence

Trail users are expected to act reasonably and to consider their own safety as well as the safety of others. Where trail users fail to do so and their own negligence contributes to injury or loss, then they may not be able to recover against the trail managers. In addition the negligent trail user might be found liable for injuries caused to other innocent trail users.

As mentioned above the *Negligence Act* provides that where the injury or damages are partly the fault of the plaintiff then damages should only be awarded in proportion to the degree of fault found against each of the parties. For examples of partial liability where the victim was also at fault, see "*Carson v. City of Thunder Bay*" (an injury in a hockey arena), and "*Buehl v. Polar Star Enterprises*" (an accident in a hotel).¹⁶

Liability Waivers and Releases

Where participants are required to register for an activity or event, there may be an opportunity to provide notice or obtain written acknowledgment of a liability waiver. In those circumstances where the trail manager could ensure that participants understood and acknowledged the physical and legal risks to be assumed, releases and liability waivers could be helpful in reducing the trail managers' liability exposure. For an example of a successful liability release which was signed as part of a ski resort seasons pass, see "*Ocsko v. Cypress Bowl Recreations Ltd.*"¹⁷

However, as the Waterfront Trail is located primarily on road right of ways and public lands, and as access to the trail is not generally restricted or controlled, it is not practical to rely upon signed releases or waivers for normal day to day trail use. Therefore, except where trail use and participation is controlled in special events, the use of waivers has not been considered as a viable approach to relieving trail managers from liability risks. In addition and as described earlier, trail managers face statutory obligations to provide safe public roads and trails. That duty could not be entirely avoided simply by obtaining releases or waivers.

LIABILITY FOR THE ACTIONS OF THIRD PARTIES

Where injuries and damage are caused by the reckless or criminal acts of individuals and not by any act or omission of the trail man-

ager, then the trail manager should not be liable.¹⁸ So for example, injuries caused by an isolated incident of assault in which a cyclist pushes a pedestrian are not the fault of the trail manager and liability should not follow. However, if the trail manager becomes aware of dangerous activities, such as a hill on which cyclists regularly speed and endanger pedestrians, then there will be an obligation to try to prevent that dangerous activity. In other words, the trail manager should not be held liable for injuries which are not caused by the trail manager and which could not reasonably be foreseen. On the other hand, once the trail manager has knowledge of the potential danger, there will be an obligation to take reasonable steps to eliminate that danger. An example of this principle may be found in a case in which a residential landlord was found negligent for not providing additional security after learning of an initial assault in a residential building.¹⁹

For the purposes of considering trail liability issues, employees engaged in trail construction and maintenance activities would not be considered as third parties. Generally, employers are responsible for the actions of employees acting within the normal scope of their employment. So, if an employee is negligent in the construction or maintenance of the trail, then the employer, the trail manager, may be responsible for injuries resulting from that negligence.

LIABILITY FOR NUISANCE

Nuisance is another potential source of liability which may be relevant to the safe operation of the proposed trail. Nuisance can be described as “an unreasonable interference with the use and enjoyment of land by an occupier or with the use and enjoyment of a public right to use and enjoy public rights of way.”²⁰ It has been applied as a remedy for unreasonable levels of noise, odours, air and water pollution and the obstruction of highways. Nuisance might address the concerns raised by municipalities regarding

interference by landowners or third parties with the operation and enjoyment of the trail. An example dealt with in additional detail below is the use of pesticides on agricultural lands which might affect trail users.

Of course it is also possible that trail managers will be liable if trail management or use activities interfere with the enjoyment of adjacent properties. For an example of road maintenance activities interfering with agricultural lands see the case of *Schenck v. The Queen*²¹ in which the province was found liable in nuisance for damage to fruit tree orchards caused by the application of salt on adjacent highways. Equivalent damage from normal trail use and maintenance activities is not anticipated. Still, trail planners and managers should be aware of the need to prevent unreasonable interference with the use and enjoyment of adjacent lands.

Agricultural Pesticides

In some agricultural communities a concern has been raised over the potential conflict between trail users and the agricultural use of pesticides. The practical experience of the Bruce Trail through the agricultural community of the Niagara Peninsula, is that this type of conflict, nuisance or injury has never been raised as an issue, or as the subject of any claim. The Bruce Trail may be routed adjacent to, but not generally through the numerous orchards of the Niagara Peninsula. The long standing experience of that trail, without claims or complaints is probably the strongest evidence that the risk of conflict or injury as between agricultural pesticide use and trail users is minimal.

In addition, the use and application of pesticides is controlled under the *Pesticides Act* R.S.O. 1990, c. P.11. Commercial “exterminators” are required to obtain licences and liability insurance. All users of pesticides face responsibility to avoid the negligent use or application of those chemicals. The municipality should not normally be liable for the negligent actions of third parties, such as

farmers or pesticide sprayers unless the municipality has knowledge of any specific risk conditions. The trail managers could assist in reducing any risk by trail signage or otherwise making landowners aware of the existence of the Trail.

Risk Management – Reducing and Controlling Liability

The major features in a risk assessment and management program should include:

- the clear assignment of risk management responsibilities;
- inspection: inventory hazards and potential liability conditions;
- document and report on trail accidents and liability claims;
- inventory trail, land and road use;
- monitor legal developments;
- mitigate the risks – through maintenance, repair, and capital and program improvements;
- educate and train trail managers and staff;
- an ethical approach: risk management with a human face;
- insurance: the ultimate and indispensable risk management tool.

THE CLEAR ASSIGNMENT OF RISK MANAGEMENT RESPONSIBILITIES

As the municipalities have ownership and maintenance responsibility for the roads, parks and other public lands over which the trail passes, it will be most efficient and appropriate for the local municipality to have direct and day to day control over the trail management responsibilities including risk management measures.

As the Trust is not directly engaged in land ownership and management, it might serve in support functions including the provision of expert technical assistance to municipal trail managers on matters such as trail planning and design. The Trust may also provide financial assistance with capital trail improvements which will contribute to risk management objectives for trail safety.

INSPECTION: INVENTORY HAZARDS AND POTENTIAL LIABILITY CONDITIONS

Regular, ongoing inspection of the trail will be required to identify potential hazards, including for example:

- trail or pavement surface conditions;
- signage requirements or maintenance;
- conflicts with adjacent landowners - whether residential, industrial or farming and livestock;
- potential trespass situations;
- condition of road intersections and railway crossings;
- natural feature hazards, watercourses, steep bluffs, forest conditions.

The frequency of inspection is a difficult issue. Where a court is determined to award compensation, the frequency of inspection can almost always be found to be deficient. However, a regular program of inspection should at least assist in limiting the size of compensation awards. In view of the duty of the trail manager to take reasonable precautions for the safety of trail users, some reasonable level of inspection program should be considered mandatory. That inspection schedule should be established considering the level of trail use and the resources available for maintenance.

The municipality responsible for day to day trail management should logically have primary responsibility for this function. It will also be essential to document the completion and results of inspections.

The Trust could assist, at the request of the municipality, with assessment of particular situations and with interpretation or application of the trail design, maintenance and signage guidelines. The Trust may also review and revise the various guidelines in response to the practical experience of the municipal trail managers.

DOCUMENT AND REPORT ON TRAIL ACCIDENTS AND LIABILITY CLAIMS

Every accident, injury or potential claim should be carefully documented and recorded. Data should include the location, the nature of the hazard and the injury, the circumstances, contributing factors, witnesses, medical attention if any and agency response. This may simply involve the application of the normal municipal accident reporting procedure to trail activities.

The accident reports and claims should be reviewed singly and collectively to identify common safety issues and particular hazards. This may also lead to identification of mitigation measures to prevent future claims arising from the same or related hazards.

The municipality will clearly be in the best position to monitor and report upon accidents and claims made against the municipality.

The Trust could monitor and report in summary form on all of the trail injury and damage claims. This information will be valuable in identifying and minimizing liability risks and in identifying improvements required in trail management and design. If individual municipalities and trail managers were willing to provide summaries of accident reports, the Trust could make that information available to all of the municipal trail managers, to help identify potential trail hazards, and to improve design and maintenance guidelines.

INVENTORY TRAIL, LAND AND ROAD USE

Where a trail location shares a right of way with another potentially conflicting or hazardous land use, the intensity of use and potential for conflict and liability should be monitored. For example, a trail location on a road with narrow pavement widths might be considered acceptable where traffic volumes are low. However, it may then be necessary to monitor the traffic volumes on that road to determine whether traffic has increased to an unacceptable level, or to a level requiring widening or improvement to the trail surface.

Managers of municipal roads and property will already be engaged in traffic counts and monitoring the use of municipal lands. They will also be most familiar with the issues and areas of concern within their municipal boundaries. The application of that local expertise to the monitoring of trail use will be a natural extension of the municipal responsibility for road and property management.

The Trust could prepare comparative analysis of the trail and traffic use, if that data were made available from municipalities and trail managers. Those comparisons should be available as a guide

to all municipal trail managers in determining where improvements may be required. It might be possible to identify or prioritize those areas of the trail most in need of improvement considering the level of use and the quality of the trail conditions.

MONITOR LEGAL DEVELOPMENTS

Trail managers and municipal risk managers should be kept up to date on developments in case law and statute law potentially affecting the trail liability issues.

This is a role which the Trust could conveniently and efficiently carry out on behalf of all of the responsible trail management agencies. The Trust would rely partly on the claims information provided by the municipalities. More general changes to statute law and case law affecting trails management could be monitored by the Trust and provided to the municipalities.

Of course some municipalities will have existing legal departments or programs of risk and claims management, and would be monitoring related legal developments in any event. For example, municipalities within Metropolitan Toronto which are engaged in a reciprocal insurance scheme already co-operate in monitoring these legal developments.

MITIGATE THE RISKS – THROUGH MAINTENANCE, REPAIR, AND CAPITAL AND PROGRAM IMPROVEMENTS

The information collected in the four preceding steps will enable trail managers to identify specific safety concerns and trail improvement requirements. The information will be useful primarily as a guide to establishing priorities for management, maintenance and repair. Capital improvement budgets and priorities could also be guided by the particular hazards identified in the

risk assessment exercise. Once identified, there will be an obligation on trail managers to take reasonable steps toward completing the necessary improvements.

Documentation of maintenance, repair and capital improvements could contribute significantly to the defense of individual liability claims. Accordingly, an easy and convenient reporting process should be developed or adapted from existing municipal programs to document these activities.

The municipality should apply the risk assessment information to the trail sections within the municipality and identify, in priority, measures that are required to mitigate the liability risks. The municipalities will further be responsible for undertaking the necessary maintenance, repair and capital improvements and for reporting on the maintenance and management activities.

The Trust might assist municipalities in identifying priorities for capital improvement based at least in part on the risk assessment information. Capital funding decisions would also be guided by the information and analysis of priorities for improvements.

EDUCATE AND TRAIN TRAIL MANAGEMENT STAFF

Local municipal staff directly engaged in maintenance of the trail and the public roads and trails over which the trail passes should be trained in emergency response (including, for example, first aid), and in risk assessment and mitigation.

Many municipalities will be providing ongoing training to parks, roads and maintenance staff in areas related to trail management. The Trust may have a role, however, in providing specialized training related to the trail and drawing upon the experience of all of the municipalities and agencies involved in trail management.

AN ETHICAL APPROACH: RISK MANAGEMENT WITH A HUMAN FACE

In concentrating upon risk management from a defensive point of view, it can be easy to lose sight of the basic ethical responsibilities that will also motivate trail managers to identify and minimize the risks of personal injury or property damage. Clearly none of the personnel and agencies responsible for trail management will want to endanger the trail users.

That basic concern for the welfare of trail users, if demonstrated throughout the trail management program and the response to claims and emergency situations, is also a powerful tool to prevent the litigation or pursuit of claims. The experience of other recreational land managers suggests that an uncaring response will do more than greed or the severity of damage to encourage injured persons to proceed with legal claims.²²

INSURANCE: THE ULTIMATE AND INDISPENSABLE RISK MANAGEMENT TOOL

In municipalities that are already managing many existing municipal roads, sidewalks, parks and recreation facilities, the additional liability risks related to the Waterfront Trail may be minimal.

These municipalities may not require any significant additional insurance coverage or any increase in existing insurance premiums as a result of the waterfront recreational trail.

However, it is not within the scope of this report to speculate on the cost of insurance coverage. The actual costs and assessment of risk will vary by municipality, and will be determined largely by the history of claims, as it exists already and as it will evolve with trail experience.

Conclusions

For trail managers, the report concludes that:

- The responsibility of trail managers to care for the safety of trail users is similar to the responsibilities and risks already faced by municipal property managers in caring for the many existing public roads, buildings and parks;
- There is a legal duty requiring the occupier or trail manager to take active steps not just to build a safe trail, but to inspect and maintain it so that dangerous conditions are identified and corrected. That duty is set out in the *Municipal Act* with respect to municipal roads and in the *Occupiers' Liability Act* with respect to other public lands;
- In some circumstances it might be found that recreational trail users have voluntarily assumed the risk and responsibility for their own safety. However, that possibility should not be relied upon by trail managers to justify any reduction in the standard of care;
- Trail design and maintenance guidelines will play a significant role in defining the reasonable standard of care required of trail managers. Failure to comply with established guidelines will increase the risk of successful liability claims;
- By undertaking a systematic program of inspection, safety review and risk management a municipal trail manager can improve the safety of trail users and decrease the potential liability for injury or damages; and

- In many municipalities the additional liability exposure related to the continuation or establishment of a waterfront trail is probably minimal in relation to the existing municipal liability for the many existing roads, sidewalks, parks and recreation facilities.

For the Waterfront Regeneration Trust, the report concludes that:

- The Trust will not normally be an owner, occupier or manager of lands. Therefore the Trust will not share automatically in the responsibility to repair and maintain public roads and lands which is assigned by statute to occupiers;
- However, in situations where the Trust engages in promoting and advertising the trail, in providing information, brochures or maps, or in organizing trail participation events it will have a responsibility to conduct those activities in a safe manner which does not misinform trail users or expose them to hazardous situations;
- To achieve the broad objective of developing a safe and enjoyable trails system as efficiently as possible, the Trust may perform the support role of providing planning, design and management advice and financial assistance toward trail capital improvements.

Endnotes

¹ *Foley et al. v. Township of East Flamborough* (1898), 29 O.R. 139 at p. 141., *McCready v. County of Brant*, [1939] S.C.R. 278.

² Ian MacF. Rogers, *The Law of Canadian Municipal Corporations* (Second edition, The Carswell Company Limited, 1971), at 1244.

³ *Public Transportation and Highway Improvement Act*, R.S.O. 1990, c. P.30, s. 33.

⁴ *Bleau et al. v. City of Nepean et al.* (1983), 21 M.P.L.R. 217.

⁵ *Houser v. Township of West Lincoln* (1983), 29 M.P.L.R. 55, (C.A.).

⁶ *Just v. British Columbia* [1989] S.C.R. 1228, at 1244.

⁷ *Waldick v. Malcolm* (1989), 70 O.R. (2d) 717, at 723 (C.A.); affirmed, *Malcolm et al. v. Waldick et al.* (1991), 83 D.L.R. (4th) 114, (S.C.C.).

⁸ *Hewitt v. The City of Etobicoke* (1986), O.J. No. 49.

⁹ *Preston v. Canadian Legion, Kingsway Branch No. 175* (1981), 123 D.L.R. (3d) 645 (C.A.), referred to in *Waldick v. Malcolm, supra*, endnote 7, at 725.

¹⁰ *Houser, supra*, endnote 5.

¹¹ *Dubois v. Sault Ste Marie* (1970), 15 D.L.R. (3d) 564.

¹² *Greatrex v. Ennismore* (1984) 33 M.V.R. 287.

¹³ *Province of Ontario v. Jennings* (1966) 57 D.L.R. (2d) 644.

¹⁴ *Waldick v. Malcolm, supra*, endnote 7.

¹⁵ *Occupiers' Liability Act*, R.S.O. 1990 c. O.2., s. 4.

¹⁶ *Carson v. City of Thunder Bay* (1985), 52 O.R. (2d) 172;
Buehl v. Polar Star Enterprises Ltd. (1989), 72 O.R. 573.

¹⁷ *Ocsko v. Cypress Bowl Recreations Ltd.* (1992), 95 D.L.R. (4th) 701.

¹⁸ *Hawryluk et al. v. Otruba et al.* (1987), 62 O.R. (2d) 154.

¹⁹ *Q et al. v. Minto Management Ltd. et al.* (1985), 49 O.R. (2d) 531.

²⁰ Allen M. Linden, *Canadian Tort Law* (Fifth edition, Butterworths, 1993), at 503.

²¹ *Schenck v. The Queen* (1981) 34 O.R. (2d) 595.

²² G. Pring, *Land Trust Liability and Risk Management* (1991), *Exchange, The Journal of the Land Trust Alliance* Vol. 10, No. 1, at 1.

Bibliography

- English, John. April 1986. *Legal Aspects of Bikeway Designation: A Special Report*, Washington, D.C. Bicycle Federation of America.
- Kaiser, Ronald A. 1986. *Liability and Law in Recreation, Parks and Sports*. Englewood Cliffs, New Jersey: Prentice-Hall.
- Kozlowski, James C., "In Search of the Adequate Warning Sign: Communication is the Key", *Parks and Recreation*, Vol. 23, p.20.
- Metropolitan Toronto (Transportation Department). October 1993. *Review of Bicycle Facilities on Metropolitan Toronto Roads*.
- Ontario Ministry of Transportation. August 1993. Interim Bikeway Guideline [draft]. Ontario.
- Peterson, James A. and Hronek, Bruce B. 1992. *Risk Management: for Park Recreation and Leisure Services* (2nd edition) Illinois: Sagamore Publishing Inc.
- Velo Quebec. 1992, *Technical Handbook of Bikeway Design*, Montreal, Quebec.
- Wasserman, Natalie, and Phelus, Dean G., editors. 1985. *Risk Management Today: A How-to Guide for Local Government*. Washington, D.C.: International City Management Association.
- Waterfront Regeneration Trust. 1995. *A Guidebook: The Waterfront Trail, Explore Yesterday, Today and Tomorrow along the Shores of Lake Ontario*. Ontario.
- _____. 1995. *Lake Ontario Greenway Strategy*. Ontario.
- _____. 1994. *Waterfront Trail Design Guidelines*, Ontario.
- _____. 1994. *Waterfront Trail Maintenance Guidelines*, Ontario.
- _____. 1994. *Waterfront Trail Signage Guidelines*, Ontario.

3 1761 11548041 0

